

BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

JOSEPH MICHAEL O'BRIEN

Respondent.

Case No. AC-2004-15

OAH No. N2005050364

DECISION AFTER NONADOPTION

On June 3, 2005, Administrative Law Judge Michael C. Cohn, Office of Administrative Hearings, heard this matter in Oakland, California.

Jeanne C. Werner, Deputy Attorney General, represented complainant Carol Sigmann, Executive Officer of the California Board of Accountancy.

Respondent Joseph Michael O'Brien represented himself.

The matter was submitted on June 3, 2005. The California Board of Accountancy ("Board") declined to adopt the Proposed Decision and issued an Order of Nonadoption on July 27, 2005. That Order stated the Board would decide the case on the record, including the transcript of the hearing and upon such written arguments as the parties might wish to submit. Written argument being received by both parties, the entire record, including the transcript and exhibits of said hearing, having been read and considered by the Board, pursuant to Government Code Section 11517, the Board hereby makes the following final decision and order:

FACTUAL FINDINGS

1. On March 18, 1989, the California Board of Accountancy issued Certified Public Accountant license number 52536 to respondent Joseph Michael O'Brien. Respondent has maintained his license in an inactive status since November 1, 1998. The license is currently renewed in that status through October 31, 2006.

2. On September 19, 2003, respondent was convicted in Alameda County, on his plea of no contest, of a misdemeanor violation of Penal Code section 487, subdivision (a), grand theft, a crime that is substantially related to the qualifications, functions and duties of a certified public accountant.

3. Upon conviction, imposition of sentence was suspended and respondent was placed on conditional release to the community (probation) for three years on terms that included one day in jail (with credit for one day already served), a fine of \$127, and restitution to the victim of \$20,293.13.

4. Respondent's crime was embezzlement. He was employed as the Chief Financial Officer of Professional Home Care, a healthcare partnership. On four occasions between December 26, 2002, and April 2, 2003, respondent took funds totaling \$4,230 from the company's checking account. On three occasions, he issued himself checks for \$1,000. On the fourth occasion, respondent made a direct payment of \$1,230 to pay a credit card debt. When respondent's actions were discovered by one of the partners on April 18, 2003, respondent repaid the full amount he had taken. He was terminated.

5. Respondent has complied with the terms of his conditional release. He has paid his fine and has made full restitution of \$20,293.13. (This amount represented losses suffered by Professional Home Care, including attorney's fees and lost employee time.) He is scheduled to remain on probation until September 2006.

6. Respondent was employed at Professional Home Care in September 2002. He was the only person with financial responsibility in the company and thus had unfettered access to company funds. Respondent was experiencing personal financial difficulties and used his access to the company's checking account to take what he describes as "advances." He testified he never intended to steal the money, and that he planned to pay it back in the future. Nevertheless, respondent fully recognizes that he acted illegally and he is "profoundly sorry" for his "gross error in judgment."

7. Less than a month after his conviction, on October 15, 2003, respondent submitted to the board a "Reportable Events Licensee Reporting Form" on which he advised the board of his conviction. In response to a subsequent letter from the board, on November 13, 2003, respondent submitted to the board full details of his crime.

8. Respondent is 42 years old. He is married and has three children. Respondent's illegal conduct and subsequent conviction put a strain upon his marriage. He and his wife undertook marriage counseling with J. Guthrie Heywood and Elizabeth Heywood. In a letter written in December 2003, the Heywoods stated:

[Respondent] discussed the nature of his offense and both he and we recognize the gravity of his actions. We believe [respondent] has demonstrated remorse for his actions both from the standpoint of the company he was working for and the repercussions which he and his wife and family have suffered. [We] have seen some men become hardened and proud when undergoing difficult circumstances. [Respondent] has demonstrated a willingness to be broken and through humility, to learn the lessons which his actions have brought before him. . . . We have a high regard for [respondent] and believe that he is becoming a man of integrity

whom both business associates and friends and family members can put their trust in once again.

9. Respondent is a long-time member of the East Bay Fellowship Church. He and his wife also counseled with the church's pastor, Reverend Ronald Steven Pinkston. In a letter written in December 2003, Rev. Pinkston stated that he felt respondent "understands the gravity of [his] serious error and has dealt with the underlying problem that gave place to it in his heart." Rev. Pinkston concluded that respondent was "genuinely regretful for the damage [his actions] caused to his family, the business that trusted him and the workplace in general." He also stated that respondent was "a sincere and conscientious person in every area of his life" who had served on the church's Business Council "with integrity and diligence," has been "very involved in serving the children in our church and our community," and who, "except for this one very serious mistake . . . has been a model citizen."

10. Since his crime, respondent has also counseled with the church's senior associate pastor, Rick Trimble, with whom respondent has developed both a personal and pastoral relationship. Over the past two years, Pastor Trimble has spoken regularly with respondent about his misconduct. During that time he has seen a number of changes in respondent, including a greater willingness to allow others into his life and to be accountable to them. Pastor Trimble believes that respondent is not a risk to re-offend. For one, respondent has an underlying foundational belief structure centering on God and the Bible. Even though respondent was a Christian when he committed his offense, Pastor Trimble believes that respondent has now returned to those "strong anchor[s]." In addition, following his crime respondent considered leaving both the field of accountancy and the geographical area in which he resides. But he decided not to do either, and Pastor Trimble sees this as an indication that respondent is willing to work through the issues that face him no matter what the cost.

11. Respondent has been a member of the East Bay Fellowship for more than 20 years. As Reverend Pinkston's letter indicated, he has been active in the church. He served on the church's Business Council for three years and has held many volunteer positions. He is currently working with his wife in the children's program.

12. David Morris and Mark Sherrill know respondent through church. Before respondent's arrest, the three of them met informally for occasional lunches. In response to respondent's arrest, the three men began to meet regularly to discuss "accountability issues," both personal and business-related. They met weekly for eight or nine months and have met on a monthly basis since then. When they began meeting, respondent was very open and honest about his crime; he was remorseful, admitted wrongdoing and asked for help in rebuilding his life.

13. After obtaining his CPA license, respondent work for Ernst & Young for about 10 years. He has not worked in public accounting since then, and put his CPA license in inactive status in 1998. He has worked in a number of financial management

positions that did not require a CPA license, but in which his employers preferred someone trained as a CPA. He was in just such a position at Professional Home Care.

14. In December 2003, three months after he was terminated from Professional Home Care, respondent was hired as the assistant controller for Avanex Corporation. At the time, CPA Barbara Hubbard was the company's Senior Director, Tax and Treasury. Respondent had a number of tax and treasury related responsibilities on which he reported directly to Hubbard. He was also assigned to some special accounting research projects under Hubbard's management. Hubbard found respondent to be professional and highly competent. She described him as a valuable employee and a mentor to the accounting staff under his supervision.

At one point during his employment, Hubbard sought to add respondent as an authorized signatory on the company's checking accounts. Because he had general ledger access, respondent refused this request on a number of occasions. It was not that respondent was afraid that he would be tempted by such authority, but rather that he wanted to avoid being put in a position where there could be even a possibility of the suspicion of misconduct. Respondent felt that it was in his interest, and in the company's interest, to maintain a segregation of functions that included his not having access to cash; this would preserve both the integrity of the company's financial statement and the credibility of respondent's work.

Respondent was terminated from Avanex Corporation In November 2004 after the company's CEO learned of his criminal acts and the CEO and the board determined it would be in the company's best interests to let respondent go.

15. After leaving Avanex, respondent began taking accounting-related jobs through temporary staffing agencies. Under that arrangement, respondent worked for a time as a contract employee at PG&E. And he is currently working for Mercury Interactive, a software firm, where as a consolidation manager he is responsible for consolidating all of the company's books and financial statements.

16. Echoing Pastor Trimble's view that respondent has now returned to the "strong anchors" of his roots, respondent testified that his entire criminal experience caused him to "renew [his] personal convictions" and to become a more cautious and attentive accountant and a better person overall. He believes his criminal actions will "forever remain a scar" on his life and serve as a constant reminder of what he has done. Respondent testified that he would never again place his family, friends and career in jeopardy by committing similar acts. He realizes that at the time of his embezzlement he was letting his personal financial woes color his thinking. He now has a much different perspective on things, and a much keener sense of the need to think about the long term, not just the present. In order to help protect himself, respondent has voluntarily chosen to take positions in which he would not have access to company funds without accountability. As indicated in Finding 14, he is not afraid of being tempted into wrongdoing, but simply does not want to be in a position where his actions could even be questioned.

17. Because his license has been inactive for many years, respondent has not been required to take continuing education courses. But as a financial manager he has felt the responsibility to be up to date on the current standards and generally accepted accounting principles. To that end, respondent reads trade journals and speaks with other accountants.

18. Respondent does not intend to actively practice as a certified public accountant. If allowed to keep his license, respondent plans to remain in an inactive status.

19. The board has incurred costs totaling \$1,748.88 in the investigation and prosecution of this matter. This includes investigative costs of \$760.88 and legal fees of \$988.00. These amounts are found to be reasonable. No evidence was presented to show that respondent cannot pay these costs or that payment would cause an unreasonable financial hardship that cannot be remedied through a payment plan.

LEGAL CONCLUSIONS

1. Business and Professions Code section 5100, subdivision (a), provides that the board may discipline a license if the holder has committed a crime that is substantially related to the qualifications, functions, and duties of a certified public accountant or a public accountant. Section 5100, subdivision (k), provides that the board may discipline a license if the holder has committed embezzlement, theft, or misappropriation of funds or property by fraudulent means or false pretenses.

2. Cause for disciplinary action against respondent's license exists pursuant to Business and Professions Code section 5100, subdivision (a), by reason of the matters set forth in Finding 2 and pursuant to section 5100, subdivision (k), by reason of the matters set forth in Findings 2 and 4.

3. Business and Professions Code section 5107, subdivision (a), provides that the holder of a certificate found to have violated the licensing law may be required to pay the reasonable costs of investigation and prosecution of the case. Section 5107, subdivision (e), provides that the amount of reasonable costs may be reduced or eliminated upon a finding that respondent cannot pay all or a portion of the costs or that payment would cause an unreasonable financial hardship that cannot be remedied through a payment plan.

4. Cause exists pursuant to Business and Professions Code section 5107, subdivision (a), to require respondent to pay \$1,748.88, the reasonable costs of investigation and prosecution. No evidence was presented that this would warrant reduction of this amount. Pursuant to section 5107, subdivision (c), these costs are payable 120 days after the final decision in this case.

5. There is no question that respondent committed a most serious crime – embezzlement from his employer. However, the evidence presented demonstrated that

this act was outside respondent's otherwise good character, that respondent is sincerely remorseful for his crime, and that he has taken steps to assure that he will not again commit such a crime. The extensive counseling respondent has undertaken, both formal and informal, will serve him in good stead. It is extremely unlikely that respondent will re-offend. Respondent has also demonstrated sufficient evidence of rehabilitation – including immediate notification to the board of his conviction, immediate repayment of the amount taken from his employer, and payment of full restitution – to show that it would not be against the public interest to permit respondent to retain his certificate upon appropriate probationary terms and conditions. The board's disciplinary guidelines (Cal. Code regs., tit. 16, § 98) provide that the penalty for embezzlement includes a minimum penalty of stayed revocation, a 90-day suspension, and three years' probation with certain standard terms and optional terms if warranted. The maximum penalty is revocation.

ORDER

Certified Public Accountant license number 52536 issued to respondent Joseph Michael O'Brien is revoked. However, the revocation is stayed and respondent is placed on probation for three years upon the following terms and conditions:

1. Respondent's license is suspended for one year. During the period of suspension, respondent shall engage in no activities for which certification as a Certified Public Accountant or Public Accountant is required as described in Business and Professions Code section 5051.
2. Respondent shall obey all federal, California, and other states' and local laws, including those rules relating to the practice of public accountancy in California.
3. Respondent shall submit, within 10 days of completion of the quarter, written reports to the board on a form obtained from the board. Respondent shall submit under penalty of perjury such other written reports, declarations, and verification of actions as are required. These declarations shall contain statements relative to respondent's compliance with all the terms and conditions of probation. Respondent shall immediately execute all release of information forms as may be required by the board or its representatives.
4. Respondent shall, during the period of probation, appear in person at interviews/meetings as directed by the board or its designated representatives, provided such notification is accomplished in a timely manner.
5. Respondent shall fully comply with the terms and conditions of the probation imposed by the board and shall cooperate fully with representatives of the California Board of Accountancy in its monitoring

and investigation of respondent's compliance with probation terms and conditions.

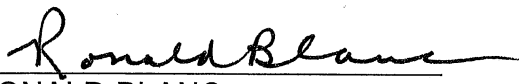
6. Respondent shall be subject to, and shall permit, a practice investigation of his professional practice. Such a practice investigation shall be conducted by representatives of the board, provided notification of such review is accomplished in a timely manner.
7. Respondent shall comply with all final orders resulting from citations issued by the California Board of Accountancy.
8. Within thirty days of the effective date of this decision, respondent shall submit to the board or its designee for its prior approval a plan of practice that shall be monitored by another CPA or PA who provides periodic reports to the board or its designee. Respondent shall pay all costs for such monitoring.
9. Respondent shall complete, and shall provide proper documentation of, completion of a board-approved eight-hour ethics course. Failure to satisfactorily complete the required course within the first year of probation shall constitute a violation of probation.
10. During the period of probation respondent shall engage in no activities which require receiving or disbursing funds for or on behalf of any other person, company, partnership, association, corporation, or other business entity.
11. Respondent shall reimburse the board \$1,748.88 for its investigation and prosecution costs. The payment shall be made within 120 days of the date of this decision unless this time is extended by the board.
12. In orders that provided for a suspension of practice, respondent shall comply with procedures provided by the board or its designee regarding notification to, and management of, clients.
13. In the event respondent should leave California to reside or practice outside this state, he must notify the board in writing of the dates of departure and return. Periods on non-California residency or practice outside the state shall not apply to reduction of the probationary period, or of any suspension. No obligation imposed herein, including requirements to file written reports, reimburse the board costs, and make restitution to consumers, shall be suspended or otherwise affected by such periods of out-of-state residency or practice except at the written direction of the board.

14. If respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and impose such discipline as is deemed warranted, including revocation of respondent's certificate. If an accusation or a petition to revoke probation is filed against respondent during probation, the board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.
15. Upon successful completion of probation, respondent's certificate will be full restored.

IT IS SO ORDERED.

The effective date of this Order is January 1, 2006.

DATED: December 2, 2005


RONALD BLANC
President
California Board of Accountancy

BEFORE THE CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the matter of the Accusation
against:

JOSEPH MICHAEL O'BRIEN
13 Velasco Court
Danville, California 94526

Certified Public Accountant
License No. 52536

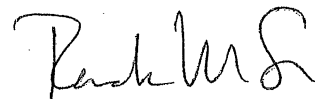
Respondent

Case No.: AC-2004-15
OAH No.: N2005050364

ORDER OF NONADOPTION OF PROPOSED DECISION

Pursuant to Section 11517 of the Government Code, the Proposed Decision of the Administrative Law Judge in the above-entitled matter is not adopted. The California Board of Accountancy will decide the case upon record, including the transcript of the hearing held on June 3, 2005, and upon such written argument as the parties may wish to submit. The Board is particularly interested in written argument directed to the question whether the penalty should be increased. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

IT IS SO ORDERED this 27th day of July, 2005



Renata M. Sos
Board President

BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOSEPH MICHAEL O'BRIEN
13 Velasco Court
Danville, California 94526

Certified Public Accountant License
No. CPA 52536,

Respondent.

Case No. AC-2004-15

OAH No. N2005050364

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on June 3, 2005.

Complainant Carol Sigmann, Executive Officer of the California Board of Accountancy, was represented by Jeanne C. Werner, Deputy Attorney General.

Respondent Joseph Michael O'Brien represented himself.

The matter was submitted for decision on June 3, 2005.

FACTUAL FINDINGS

1. On March 18, 1989, the California Board of Accountancy issued Certified Public Accountant license number 52536 to respondent Joseph Michael O'Brien. Respondent has maintained his license in an inactive status since November 1, 1998. The license is currently renewed in that status through October 31, 2006.

2. On September 19, 2003, respondent was convicted in Alameda County, on his plea of no contest, of a misdemeanor violation of Penal Code section 487, subdivision (a), grand theft, a crime that is substantially related to the qualifications, functions and duties of a certified public accountant.

3. Upon conviction, imposition of sentence was suspended and respondent was placed on conditional release to the community (probation) for three years on terms that included one day in jail (with credit for one day already served), a fine of \$127, and restitution to the victim of \$20,293.13.

4. Respondent's crime was embezzlement. He was employed as the Chief Financial Officer of Professional Home Care, a healthcare partnership. On four occasions between December 26, 2002, and April 2, 2003, respondent took funds totaling \$4,230 from the company's checking account. On three occasions, he issued himself checks for \$1,000. On the fourth occasion, respondent made a direct payment of \$1,230 to pay a credit card debt. When respondent's actions were discovered by one of the partners on April 18, 2003, respondent repaid the full amount he had taken. He was terminated.

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12. David Morris and Mark Sherrill know respondent through church. Before respondent's arrest, the three of them met informally for occasional lunches. In response to respondent's arrest, the three men began to meet regularly to discuss "accountability issues," both personal and business-related. They met weekly for eight or nine months and have met on a monthly basis since then. When they began meeting, respondent was very open and honest about his crime; he was remorseful, admitted wrongdoing and asked for help in rebuilding his life.

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14. In December 2003, three months after he was terminated from Professional Home Care, respondent was hired as the assistant controller for Avanex Corporation. At the time, CPA Barbara Hubbard was the company's Senior Director, Tax and Treasury. Respondent had a number of tax and treasury related responsibilities on which he reported directly to Hubbard. He was also assigned to some special accounting research projects under Hubbard's management. Hubbard found respondent to be professional and highly competent. She described him as a valuable employee and a mentor to the accounting staff under his supervision.

At one point during his employment, Hubbard sought to add respondent as an authorized signatory on the company's checking accounts. Because he had general ledger access, respondent refused this request on a number of occasions. It was not that respondent was afraid that he would be tempted by such authority, but rather that he wanted to avoid being put in a position where there could be even a possibility of the suspicion of misconduct. Respondent felt that it was in his interest, and in the company's interest, to maintain a segregation of functions that included his not having access to cash; this would preserve both the integrity of the company's financial statement and the credibility of respondent's work.

It was after respondent's refusal to become an authorized signatory that he told Hubbard of his criminal actions. Hubbard was "shocked" to learn of this because she had never observed any behavior by respondent that had even the suggestion of impropriety. Respondent openly discussed his crime with Hubbard, expressing sincere remorse and regret. Hubbard believes that respondent fully realizes the "extreme lack of judgment" his actions showed. Hubbard believes that respondent has been rehabilitated and will not re-offend.

Respondent was terminated from Avanex Corporation in November 2004 after the company's CEO learned of his criminal acts and the CEO and the board determined it would be in the company's best interests to let respondent go.

15. After leaving Avanex, respondent began taking accounting-related jobs through temporary staffing agencies. Under that arrangement, respondent worked for a time as a contract employee at PG&E. And he is currently working for Mercury Interactive, a software firm, where as a consolidation manager he is responsible for consolidating all of the company's books and financial statements.

16. Echoing Pastor Trimble's view that respondent has now returned to the "strong anchors" of his roots, respondent testified that his entire criminal experience caused him to "renew [his] personal convictions" and to become a more cautious and attentive accountant and a better person overall. He believes his criminal actions will "forever remain a scar" on his life and serve as a constant reminder of what he has done. Respondent testified that he would never again place his family, friends and career in jeopardy by committing similar acts. He realizes that at the time of his embezzlement he was letting his personal financial woes color his thinking. He now has a much different perspective on

things, and a much keener sense of the need to think about the long term, not just the present. In order to help protect himself, respondent has voluntarily chosen to take positions in which he would not have access to company funds without accountability. As indicated in Finding 14, he is not afraid of being tempted into wrongdoing, but simply does not want to be in a position where his actions could even be questioned.

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18. Respondent does not intend to actively practice as a certified public accountant. If allowed to keep his license, respondent plans to remain in an inactive status.

19. The board has incurred costs totaling \$1,748.88 in the investigation and prosecution of this matter. This includes investigative costs of \$760.88 and legal fees of \$988.00. These amounts are found to be reasonable. No evidence was presented to show that respondent cannot pay these costs or that payment would cause an unreasonable financial hardship that cannot be remedied through a payment plan.

LEGAL CONCLUSIONS

1. Business and Professions Code section 5100, subdivision (a), provides that the board may discipline a license if the holder has committed a crime that is substantially related to the qualifications, functions, and duties of a certified public accountant or a public accountant. Section 5110, subdivision (k), provides that the board may discipline a license if the holder has committed embezzlement, theft, or misappropriation of funds or property by fraudulent means or false pretenses.

2. Cause for disciplinary action against respondent's license exists pursuant to Business and Professions Code section 5100, subdivision (a), by reason of the matters set forth in Finding 2 and pursuant to section 5100, subdivision (k), by reason of the matters set forth in Findings 2 and 4.

3. Business and Professions Code section 5107, subdivision (a), provides that the holder of a certificate found to have violated the licensing law may be required to pay the reasonable costs of investigation and prosecution of the case. Section 5107, subdivision (e), provides that the amount of reasonable costs may be reduced or eliminated upon a finding that respondent cannot pay all or a portion of the costs or that payment would cause an unreasonable financial hardship that cannot be remedied through a payment plan.

4. Cause exists pursuant to Business and Professions Code section 5107, subdivision (a), to require respondent to pay \$1,748.88, the reasonable costs of investigation and prosecution. No evidence was presented that would warrant reduction of this amount.

Pursuant to section 5107, subdivision (c), these costs are payable 120 days after the final decision in this case unless this time is extended by the board.

5. There is no question that respondent committed a most serious crime – embezzlement from his employer. However, the evidence presented demonstrated that this act was outside respondent's otherwise good character, that respondent is sincerely remorseful for his crime, and that he has taken steps to assure that he will not again commit such a crime. The extensive counseling respondent has undertaken, both formal and informal, will serve him in good stead. It is extremely unlikely that respondent will re-offend. Respondent has also demonstrated sufficient evidence of rehabilitation – including immediate notification to the board of his conviction, immediate repayment of the amount taken from his employer, and payment of full restitution – to show that it would not be against the public interest to permit respondent to retain his certificate upon appropriate probationary terms and conditions. The board's disciplinary guidelines (Cal. Code Regs., tit. 16, § 98) provide that the minimum recommended penalty for embezzlement includes a stayed revocation, a 90-day suspension, and three years' probation with certain standard terms and optional terms if warranted. This minimum recommended penalty is appropriate in this case. Warranted optional terms included supervised practice, completion of an ethics course, a prohibition from handling funds, payment of costs, and notification to clients re: suspension (conditions 8 through 12, below).

ORDER

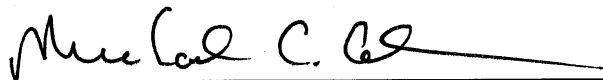
Certified Public Accountant license number 52536 issued to respondent Joseph Michael O'Brien is revoked. However, the revocation is stayed and respondent is placed on probation for three years upon the following terms and conditions:

1. Respondent's license is suspended for ninety days. During the period of suspension, respondent shall engage in no activities for which certification as a Certified Public Accountant or Public Accountant is required as described in Business and Professions Code section 5051.
2. Respondent shall obey all federal, California, and other states' and local laws, including those rules relating to the practice of public accountancy in California.
3. Respondent shall submit, within 10 days of completion of the quarter, written reports to the board on a form obtained from the board. Respondent shall submit under penalty of perjury such other written reports, declarations, and verification of actions as are required. These declarations shall contain statements relative to respondent's compliance with all the terms and conditions of probation. Respondent shall immediately execute all release of information forms as may be required by the board or its representatives.

4. Respondent shall, during the period of probation, appear in person at interviews/meetings as directed by the board or its designated representatives, provided such notification is accomplished in a timely manner.
5. Respondent shall fully comply with the terms and conditions of the probation imposed by the board and shall cooperate fully with representatives of the California Board of Accountancy in its monitoring and investigation of respondent's compliance with probation terms and conditions.
6. Respondent shall be subject to, and shall permit, a practice investigation of his professional practice. Such a practice investigation shall be conducted by representatives of the board, provided notification of such review is accomplished in a timely manner.
7. Respondent shall comply with all final orders resulting from citations issued by the California Board of Accountancy.
8. Within thirty days of the effective date of this decision, respondent shall submit to the board or its designee for its prior approval a plan of practice that shall be monitored by another CPA or PA who provides periodic reports to the board or its designee. Respondent shall pay all costs for such monitoring.
9. Respondent shall complete, and shall provide proper documentation of, completion of a board-approved eight-hour ethics course. Failure to satisfactorily complete the required course within the first year of probation shall constitute a violation of probation.
10. During the period of probation respondent shall engage in no activities which require receiving or disbursing funds for or on behalf of any other person, company, partnership, association, corporation, or other business entity.
11. Respondent shall reimburse the board \$1,748.88 for its investigation and prosecution costs. The payment shall be made within 120 days of the date of the board's final decision unless this time is extended by the board.
12. In orders that provide for a suspension of practice, respondent shall comply with procedures provided by the board or its designee regarding notification to, and management of, clients.

13. In the event respondent should leave California to reside or practice outside this state, he must notify the board in writing of the dates of departure and return. Periods of non-California residency or practice outside the state shall not apply to reduction of the probationary period, or of any suspension. No obligation imposed herein, including requirements to file written reports, reimburse the board costs, and make restitution to consumers, shall be suspended or otherwise affected by such periods of out-of-state residency or practice except at the written direction of the board.
14. If respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and impose such discipline as is deemed warranted, including revocation of respondent's certificate. If an accusation or a petition to revoke probation is filed against respondent during probation, the board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.
15. Upon successful completion of probation, respondent's certificate will be fully restored.

DATED: June 14, 2005



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

BILL LOCKYER, Attorney General
of the State of California
JEANNE C. WERNER, State Bar No. 93170
Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2226
Facsimile: (510) 622-2121

Attorneys for Complainant

**BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

JOSEPH MICHAEL O'BRIEN
13 Velasco Court
Danville, CA 94526

Certified Public Accountant License
No. CPA 52536

Respondent.

Case No. AC-2004-15

OAH No. _____[Unassigned]

ACCUSATION

Complainant alleges:

PARTIES AND JURISDICTION

1. Complainant Carol Sigmann brings this Accusation under the authority of Section 5100 of the Business and Professions Code,¹ solely in her official capacity as the Executive Officer of the California Board of Accountancy, Department of Consumer Affairs.

2. On or about March 18, 1989, the California Board of Accountancy issued Certified Public Accountant License Number CPA 52536 to Joseph Michael O'Brien, Respondent herein. The Certified Public Accountant License, which has been renewed in an inactive capacity during all times relevant herein, will expire on October 31, 2004, unless it is

1. All statutory references are to the Business and Professions Code unless otherwise indicated.

1 renewed.

2 3. Section 5100 of the Business and Professions Code provides, in relevant
3 part, that, after notice and hearing the board may revoke, suspend or refuse to renew any permit
4 or certificate granted, or may censure the holder of that permit or certificate, for unprofessional
5 conduct which includes, but is not limited to, one or any combination of the causes specified
6 therein, including:

7 5100 (a) Conviction of any crime substantially related to the qualifications,
8 functions and duties of a certified public accountant or a public
9 accountant.

10 5100 (k) Embezzlement, theft, misappropriation of funds or property, or obtaining
11 money, property, or other valuable consideration by fraudulent means or
12 false pretenses.

13 4. Under Board Rule 99², a crime or act is substantially related to the
14 qualifications, functions, or duties of a CPA if, to a substantial degree, it evidences present or
15 potential unfitness to perform the functions authorized by the licensee's certificate or permit in a
16 manner consistent with the public health, safety, or welfare.

17 5. Section 5106 provides in pertinent part that a conviction means a plea of
18 guilty...(and) any action which a board is permitted to take following the establishment of a
19 conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has
20 been affirmed on appeal, or when an order granting probation is made suspending the imposition
21 of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the
22 Penal Code.

23 6. Pursuant to Code section 118(b), the suspension, expiration, or forfeiture
24 by operation of law of a license issued by the Board shall not during any period within which it
25 may be renewed, restored, reissued or reinstated, deprive the Board of its authority to institute or
26 continue a disciplinary proceeding against the licensee upon any ground provided by law or to
27

28 2. Codified at Title 16, California Code of Regulations, section 99.

1 enter an order suspending or revoking the license or otherwise taking disciplinary action against
2 the licensee on any such ground. Code section 5070.6 provides that an expired permit may be
3 renewed at any time within five years after its expiration upon compliance with certain
4 requirements.

5 7. Code section 5107 provides for recovery by the Board of all reasonable
6 costs of investigation and prosecution of the case, including, but not limited to, attorney's fees in
7 specified disciplinary actions, including violations of Code section 5100(k). A certified copy of
8 the actual costs, or a good faith estimate of costs signed by the Executive Officer, constitutes
9 prima facie evidence of reasonable costs of investigation and prosecution of the case.

10 **FOR CAUSES FOR DISCIPLINE**

11 **First Cause for Discipline - Conviction of a Crime Substantially Related**
12 (bus. & Prof. Code Section 5100(a))

13 8. Respondent is subject to disciplinary action pursuant to Code section
14 5100(a) in that, on September 19, 2003, he was convicted, pursuant to his plea of no contest, in
15 the Superior Court of California, County of Alameda (Fremont), in *People v. Joseph M.*
16 *O'Brien*, Case No. 203546-0, of one misdemeanor violation under Section 487(A) of the
17 California Penal Code (grand theft). At all times relevant herein, Respondent held a valid but
18 inactive CPA license.

19 9. The circumstances underlying the conviction are that Respondent,
20 between December 26, 2002 and April 2, 2003, while acting as a financial executive in the
21 employ of a healthcare partnership, the Professional Home Care, Fremont, California, embezzled
22 \$4,230.00, which subjected him to a felony charge of grand theft by embezzlement. When the
23 defalcation was discovered on April 18, 2003 by one of the partners, Respondent repaid the
24 amount to the partnership (and his employment was terminated). Respondent pled guilty to the
25 charge, which was reduced by the court to a misdemeanor, and respondent was sentenced to three
26 years probation and ordered to pay additional restitution of \$20,293.13³ to the victim

27 _____
28 3. The amount included reimbursement of legal fees and related expenses.

1 Professional Home Care, and a fine of \$127.00.

2 10. Incorporating by reference the allegations in paragraphs 8 and 9,
3 Respondent's certificate is subject to discipline under Code section 5100(a) in that the conviction
4 of embezzlement is a crime substantially related to the qualifications, functions or duties of a
5 CPA within the meaning of Board Rule 99. Respondent occupied a position of financial
6 responsibility and trust at the healthcare partnership and used his position to embezzle funds.

7 **Second Cause for Discipline - Embezzlement**
8 (Bus. & Prof. Code Section 5100(k))

9 11. Incorporating by reference the allegations in paragraphs 8 and 9,
10 Respondent's CPA certificate is subject to discipline under Code section 5100(k) in that
11 Respondent's misconduct constitutes embezzlement.

12 **OTHER MATTERS**

13 12. Pursuant to Code section 5107, it is requested that the administrative law
14 judge, as part of the proposed decision in this proceeding, direct Respondent to pay to the Board
15 all reasonable costs of investigation and prosecution in this case, including, but not limited to,
16 attorneys' fees.

17 **PRAYER**

18 WHEREFORE, Complainant requests that a hearing be held on the matters herein
19 alleged, and that following the hearing, the California Board of Accountancy issue a decision:

20 1. Revoking, suspending, or otherwise imposing discipline upon Certified
21 Public Accountant License Number CPA 52536, issued to Joseph Michael O'Brien;

22 2. Ordering Joseph Michael O'Brien to pay the California Board of
23 Accountancy the reasonable costs of the investigation and enforcement of this case, pursuant to
24 Business and Professions Code section 5107;

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3. Taking such other and further action as deemed necessary and proper.

DATED: March 17, 2004


CAROL SIGMANN
Executive Officer
California Board of Accountancy
Department of Consumer Affairs
State of California
Complainant

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